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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WALTER CHARLES COMMINEY, Defendant and Appellant.	G040061 (Super. Ct. No. FVA023273) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernadino County, Raymond L. Haight III, Judge. Affirmed.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Walter Charles Comminey of first degree felony murder (Pen. Code, § 187, subd. (a)) and found to be true allegations he personally used and discharged a firearm causing death (Pen. Code, § 12022.53, subds. (b), (c) & (d); all further statutory references are to the Penal Code unless noted otherwise). Defendant argues the trial court abused its discretion by admitting evidence of prior uncharged robberies to show he harbored a similar intent to rob the victim here. (Evid. Code, § 1101, subd. (b).) As we explain below, defendant's challenge is without merit, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Around 6:00 p.m. on November 24, 2004, Luis Soria and his neighbor, Antonio Salcedo, set out on foot to a nearby Albertson's grocery store in Rialto. Soria needed to pick up medicine for his son, and Salcedo accompanied him to buy a gallon of milk. Thirteen-year-old Treyvon Lewis was on his way to the same grocery store when he met up with defendant, who was 18, and 16-year-old David Goffney. Lewis recognized defendant and Goffney because they lived in his neighborhood; he "knew their names and stuff." When the duo learned Lewis was headed to the grocery store, they fell in with him in the alleyway, stating they were "going that way too," but they continued talking "to the[m]selves." Lewis overheard them plotting a purse snatch, but Goffney dissented, stating, "Too many security. [*sic*]" Defendant complained they should have targeted the area around a different grocery store.

As the three reversed course in the alley, Soria came around the corner with Salcedo. Defendant proposed, "'Let's get him.'" After Soria and Salcedo passed by, defendant approached Soria from behind, drew his attention, got "[r]ight in his face," and

pointed a gun at him, demanding, "'Give me the money.'" Defendant repeated his demand as Soria responded, "No money" and "'No, no English,'" and when Soria pleaded again, "No money," defendant struck him in the head with the gun. Soria fell to his knees facing defendant. Soria tried to rise, but staggered to the ground. Defendant repeatedly demanded Soria's wallet, but Soria again responded, "No money." Soria placed his hands on the ground, and dropped his head. Lewis heard Goffney say, "'He has a knife,'" but Soria did not reach for anything on his body; instead, he raised his face upward and placed his hand on defendant's leg. Defendant grabbed Soria by the head, held the gun to the back of his neck, and fired a single gunshot. Lewis fled, and so did defendant and Goffney.

An autopsy revealed gunpowder soot surrounding the bullet entry hole at the center of the base of Soria's neck, indicating the fatal shot was fired from within two inches. The bullet immediately struck the cervical spine, shattering the bone and destroying the spinal cord, resulting in immediate paralysis. The bullet fragmented into several pieces retrieved near the heart. One perforated the heart, resulting in internal blood loss that caused Soria to die within minutes. The autopsy also revealed a bruise to Soria's scalp above the left ear, consistent with being struck by a hard object like a gun. Police investigation at the scene of the crime revealed Soria had cash, but no weapon.

Security cameras from a nearby restaurant captured video footage of Soria, Salcedo, and three other people in the alley near the time of the shooting. After the Rialto Police Department held a press conference requesting leads, an anonymous tipster identified Lewis. In a live lineup, Salcedo subsequently identified defendant as the shooter.[1]

[1] At trial, defendant's expert witness testified concerning cross-racial misidentifications and methods of conducting a lineup that make it more likely the

The police placed defendant and Goffney in a room together and videotaped their conversation. Defendant warned Goffney, "[D]on't commit to nothing. They're lying. They don't got nothing." He claimed, "I just sat here and looked at the pictures," and counseled Goffney, "Just — they don't got shit on videotape. It shows — it shows people, but it don't show us. You can't tell it's us." In a taped jailhouse telephone call to a female friend, defendant asked her, "Everybody speaking on it?" After receiving an affirmative response, defendant complained the police had no evidence except that he believed Goffney was "running his mouth." Defendant commented ominously, "[H]e fucked either way [*sic*]. Know what I'm sayin'? I get out he's fucked . . . . If I don't get out he's fucked."

To prove the intent necessary for the robbery charge underlying the prosecutor's felony murder theory, the prosecutor introduced evidence of two prior crimes defendant admitted committing less than a year earlier. First, Salem Massoud testified that in June 2003 he was selling ice cream from a truck when three African-American men approached him and placed an order. Massoud "turned around to get the ice cream" and, "[a]s soon as I turned back, they pulled out the gun." One assailant pointed a gun at Massoud from about a foot away, demanding, "'Give me the money.'" The other two men lifted their shirts to display guns in their waistbands. Massoud handed over between $100 and $150. Defendant was later apprehended; still a juvenile, he admitted to robbery and personal use of a firearm allegations.

In the second incident, in December 2003, defendant and three other African-American males entered a nonfood aisle in an Albertson's grocery store and stuffed items in a bag. The four men argued with the manager when he confronted them,

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suspect will be chosen. Defendant does not challenge the legality of the lineup. Defendant is African-American, and Salcedo is Hispanic. Lewis is African-American.

pushed another store employee aside and, during a struggle before two of the four were apprehended, one yelled, "'Go get a gun and shoot these fools.'" Defendant, still a juvenile, admitted to commercial burglary in exchange for dismissal of a robbery allegation stemming from the incident.

Following the jury verdict, the trial court sentenced defendant to 50 years to life on the murder count, consisting of 25 years to life for the base term, doubled pursuant to the Three Strikes law (§ 1170.12, subd. (c)(1)) based on a prior serious violent felony defendant admitted. The trial court also imposed the mandatory consecutive term of 25 years to life for the use of a gun to commit the murder (§ 12022.53, subd. (d)), and suspended imposition of sentence on the other firearm allegations (see § 12022.53, subd. (f)). Defendant now appeals.

II

DISCUSSION

Defendant contends the trial court erred by admitting the evidence of his uncharged crimes to show he harbored a similar intent to commit robbery in the present case. All relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).) Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) We review a trial court's decision to admit evidence of a prior uncharged

offense pursuant to Evidence Code section 1101, subdivision (b), under the deferential abuse of discretion standard. Discretionary decisions must stand on appeal, absent a showing the court's ruling was arbitrary, capricious or patently absurd, and caused a miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Evidence that a defendant committed crimes other than those currently charged may not be admitted to prove his or her bad character or criminal disposition. (Evid. Code, § 1101, subd. (a).) But such evidence is admissible to prove other issues, including the perpetrator's identity, the existence of a common plan or scheme, or the intent with which the perpetrator acted in the charged crimes. (*Id.*, subd. (b).) The uncharged crime must be sufficiently similar to the charged offense to support a rational inference of identity, a common plan, or intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*).) The requisite degree of similarity varies according to the purpose of the evidence.

To prove *identity,* for example, the charged and uncharged offenses must display a "'pattern and characteristics . . . so unusual and distinctive as to be like a signature.'" (*Ewoldt, supra,* 7 Cal.4th at p. 403.) A *common design or plan,* in contrast, requires only common features "indicat[ing] the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Ibid.*) The least degree of similarity between charged and uncharged crimes is required to establish adequate relevance for admission on the issue of *intent.* (*Id.* at p. 402.) The evidence of the uncharged crimes need only be "sufficiently similar [to the charged offenses] to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations .]'" (*Ibid.*)

Defendant's attack on Soria at gunpoint in a group of males demanding money or property is sufficiently similar to his completed crimes to infer he shared the same intent in each instance. Defendant seizes on the dissimilarity that neither of the

prior offenses involved homicide, but he overlooks that the purpose of the evidence was to prove his intent to steal, not kill. Defendant's robbery of Massoud was very similar to the attempted robbery of Soria. In both, bolstered by accomplices to outnumber the victim, defendant's group also deployed the element of surprise by accosting a stranger on the street and letting the victim turn his back before springing on him with a pointed gun, demanding money. Defendant admitted to robbery and personal use of a firearm in this instance. True, the Albertson's incident involved only a *threat* to use a gun, but the threat revealed an intent similar to the charged crime to accomplish the theft by threatening the victims with gun violence and intimidating them through strength in numbers. Defendant admitted to commercial burglary in the Albertson's incident upon dismissal of the robbery allegation. Having admitted to robbery at gunpoint and a burglary involving a threat to use a gun, the similarity of those offenses justified the trial court in admitting them as evidence defendant harbored a similar intent to rob Soria.

Defendant complains the evidence of the prior offenses was more prejudicial than probative (Evid. Code, § 352) because he did not dispute the perpetrator's intent was to rob Soria, but rather that he was the perpetrator. But by pleading not guilty, defendant placed all elements of the felony murder charge in dispute at trial. (*People v. Lindberg* (2008) 45 Cal.4th 1, 23; *People v. Catlin* (2001) 26 Cal.4th 81, 146.) Defendant argues the evidence should have been excluded to eliminate any danger the jury might misuse the evidence beyond its scope, for instance, as evidence of the perpetrator's identity and not merely his intent. But the trial court explicitly instructed the jury the evidence was to be considered only for the limited purpose of determining intent, not identity. (See Judicial Council of Cal. Crim. Jury Instns. CALCRIM Nos. 303, 375.) We presume the jury followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; see *People v. Zack* (1986) 184 Cal.App.3d 409, 416 ["'In the absence of evidence to the contrary, the presumption [that the jury adhered to the limiting instructions] will control.' [Citation.]"].)

In any event, even assuming arguendo the trial court committed any conceivable error in admitting the evidence, the error was harmless. The evidence of defendant's identity as the perpetrator was overwhelming, consisting not only of his incriminating jailhouse admissions to Goffney and his female caller, but also the eyewitness testimony of Lewis and Salcedo. As to intent, defendant concedes "it is difficult to conceive of any intent the shooter could have had *other* than the intent to rob Soria." (Original italics.) While defendant argues "the shooter's intent was *overwhelmingly strong* without the necessity of resorting to evidence of other crimes" (italics added), precisely because the other evidence of intent was so strong, any possible error in admitting the evidence was harmless.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.